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In the Supreme Court of the United States

October Term, 1975

No.

Dorcea Mielke, et al.,
Petitioners,

vs

Singara Grotto, Inc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, ERIE COUNTY

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in the case of *Dorcea Mielke, et al. v. Singara Grotto, Inc., et al.*, entered November 28, 1975. That judgment dismissed an appeal from the judgment of the Court of Appeals, Eighth Judicial District of Ohio, entered July 18, 1975, affirming a judgment against Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals, Eighth Judicial District of Ohio, has not been reported. It is printed as Appendix B hereto. The Supreme Court of Ohio dismissed Petitioners' appeal without opinion. The Notice of Dismissal appears in Appendix C hereto.

JURISDICTION

The Supreme Court of Ohio denied Petitioners' motion for hearing on November 28, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

1. Whether, once a State, by its laws, accords to its citizens the right to trial by jury, the Courts of that State are thereby bound by the mandate of the Seventh Amendment to the United States Constitution, prohibiting the trial and appellate courts from re-examining the facts found by the jury otherwise than according to the rules of common law.

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of common law."

The Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 6, 1971, the Petitioner, Dorcea Mielke, slipped and fell on a tile floor in a building owned by Singara Grotto, Inc. The floor was covered with a floor finish called Triple Life, which was sold to Singara Grotto, Inc. by the Sandusky Paint Company. Purex Corporation, Inc., the manufacturer, had supplied the product to the vendor paint company. As a result of Petitioner's fall, she became permanently disabled and wheelchair bound, suffering medical debts in excess of thirty-five thousand dollars ($35,000.00). On March 20, 1973, Petitioners instituted an action for personal injuries received by Dorcea, and loss of services and consortium by her husband, asking for three hundred thousand dollars ($300,000.00).

During a two-week jury trial, Singara Grotto, Inc., was dismissed on its motion for a directed verdict. The Respondent, Purex, moved for a directed verdict at the close of Petitioners' case. The motion was overruled. The trial court again denied Respondent's renewed motion for a directed verdict at the conclusion of the trial. In both instances, following the standard set forth in Rule 50(A) (4) of the Ohio Rules of Civil Procedure, the trial judge concluded that as there were obvious questions of fact, upon which reasonable minds could differ, the matter was for the jury. The case was then sent to the jury, which returned a verdict in favor of Petitioners in the total sum of two hundred ten thousand dollars ($210,000.00). Pursuant to Ohio Rules of Civil Procedure 50 (B) and (C), Respondent, Purex, and the Sandusky Paint Company filed motions for judgment notwithstanding the verdict and in the alternative for a new trial. The trial judge overruled their motions for a new trial, but granted the motions for judgment notwithstanding the verdict, setting aside the verdict and judgment for Petitioners on the grounds that:

(1) The verdict and judgment are not supported by substantial probative evidence.
(2) The uncontroverted evidence clearly demonstrated that the Plaintiff, Dorcea Mielke, assumed the risk of her injury.
(3) The verdict and judgment are contrary to law.

The Court of Appeals affirmed the judgment notwithstanding the verdict on the grounds that :

(1) There was insufficient evidence to permit reasonable minds to reach different conclusions as to the existence of a defect;
(2) Even if there was a defect, Plaintiff Dorcea had assumed the risk of injury due to such defect; and
(3) Since the evidence as to all causes of Dorcea's fall were equal, Plaintiff had not met its burden of proof in establishing the alleged defect as the sole and proximate cause of Plaintiff's injuries.

REASONS FOR GRANTING THE WRIT

I. Once a State, by its laws, accords to its citizens the right to trial by jury, the courts of that State are thereby bound by the mandate of the Seventh Amendment to the United States Constitution, prohibiting the trial and appellate courts from re-examining the facts found by the jury otherwise than according to the rules of common law.

Article 1, Section 16, of the Constitution of the State of Ohio provides:

> "All courts shall be open, and every person, for an injury done in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. ***."

Article 1, Section 5, of the Constitution of the State of Ohio provides:

> "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Accord: Ohio Rules of Civil Procedure, Rule 38(A).

At common law, the only known modes of re-examining facts found by the jury were the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. But the fact that there are means, at common law, for reviewing findings of fact, in no way diminishes the fundamental nature of the right to trial by jury in civil cases. The fact that there does exist such means of reviewing

facts under certain circumstances simply gives meaning to the language of the Seventh Amendment of the United States Constitution when it says that no fact tried by a jury shall be otherwise examined *than according to the rules of common law*. These "rules of common law" do not include a rule permitting trial and appellate courts to substitute their own findings of fact for those of the jury, even where no manifest error is found to exist in the jury findings, and to reverse the verdict of the jury even though no error of law is found.

The fact is that in the instant case both the trial and appellate courts re-examined the jury's findings of fact otherwise than according to common law. Each court plainly disagreed with the jury's findings and simply substituted their interpretation of the facts for that of the jury. The findings of the jury, and thus Petitioners' right to a jury trial, guaranteed under the Ohio and United States Constitutions, became meaningless, in violation of Petitioners' Seventh and Fourteenth Amendment rights.

In the instant case, Petitioners took advantage of the right to jury trial, accorded them by Article 1, Section 5, of the Constitution of the State of Ohio. Both at the close of Petitioners' case and at the conclusion of the trial, Respondent moved for a directed verdict. The trial court denied Respondent's motions on both occasions, finding that reasonable minds could differ on the issue of Respondent's negligence. On this basis, the case went to the jury, which unanimously found Respondent negligent and returned a substantial, two hundred ten thousand dollar ($210,000.00) verdict in favor of Petitioners. Between the time Respondent moved for a directed verdict at the close of the evidence and the time of Respondent's motion for judgment notwithstanding the verdict, no new evidence was presented. The only important event which occurred in the interim was a unanimous jury finding that Respondent was negligent.

It has been uniformly recognized, on both the State and Federal level, that where questions of negligence and causation exist, the Seventh Amendment to the United States Constitution and the common law require that only the jury resolve them. See *Alwright Mut. Ins. Co. v. Philadelphia Electric Co.*, 927 F. 2d 1273, 1275 (1970). In the instant case, the trial court completely disregarded this fundamental rule. The trial court not only re-examined the facts found by the jury and concluded that they had acted as unreasonable men and women, but also denied Respondent's motion for a new trial and deprived Petitioners of a two hundred ten thousand dollar ($210,000.00) verdict which the jury determined was rightfully theirs. On appeal, the court clearly violated the mandate of the Seventh Amendment, by re-examining the findings of the jury otherwise than according to the rules of common law. The appellate court made no finding of manifest error in the jury's verdict. It simply substituted its findings for those of the jury. Not only did the trial court deny Petitioners due process of law, but the appellate court violated the explicit proscriptions of the Seventh Amendment. Petitioners were deprived of due process of law under the Fourteenth Amendment to the United States Constitution, the right to a fair and effective jury trial under the Seventh Amendment to the United States Constitution and Article 1, Section 5 of the Constitution of the State of Ohio, and the proscription of the Seventh Amendment to the United States Constitution prohibiting courts from re-examining the findings of the jury otherwise than according to the rules of common law.

Petitioners contend that the right to trial by jury in civil cases should be declared to be just as fundamental a right in the State Courts as the United States Constitution has declared it to be in the Federal Courts, and that civil jury

trials, in the State Courts, should be subject to the mandates and proscriptions of the Seventh Amendment. It is a matter of historical fact that the constitution of the United States was originally ratified and adopted only with the understanding that certain amendments would be made which would protect what was believed by the States to be certain fundamental and inalienable rights. The result of this understanding was the first ten Amendments, usually referred to as the Bill of Rights. Found predominately included among these Amendments is Amendment Number Seven, which guarantees the right to trial by jury in civil cases, and specifically precludes courts from re-examining, other than according to the rules of common law, facts found by the jury. The promise of the inclusion, by amendment, of the right to trial by jury in civil cases was a prerequisite to the adoption of the Constitution itself. The constitutional importance of the principles contained in the Seventh Amendment was recognized by the United States Supreme Court in *Chicago, B. & Q. R. Co., v. City of Chicago,* 166 U.S. 226, 17 S. Ct. 581, 587, 41 L. Ed. 979 (1897):

> "One of the objections made to the acceptance of the constitution as it came from the hands of the convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that, under it, facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of common law. The seventh amendment was intended to meet those objections, and to deprive the courts of the United States of any such authority."

To conclude that the right to trial by jury in civil cases, with the findings of fact of the jury being considered final except as otherwise provided by common law concepts, is not

and has not always been considered a fundamental right by the American people, is simply to defy history. The Declaration of Resolves of the First Continental Congress had, as one of its provisions:

> "5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."
> See Stuart Gerry Brown, "We Hold These Truths," 1941, p.20.

This was listed in the "Declarations and Resolves" as one of the rights of the inhabitants of the English Colonies in North America "by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts ***."

The Virginia Bill of Rights, adopted by the Virginia Convention on June 12, 1776, provided:

> "11. That in controversies respecting property, and in suits between man and man, the ancient right of trial by jury is preferable to any other and ought to be held sacred."
> See "We Hold These Truths," supra, p. 35.

The Declaration of Independence, in reciting grievances against King George, includes:

> "For depriving us in many cases of the benefits of Trial by Jury."

The Massachusetts Bill of Rights, largely the work of John Adams, stated:

> "XV. In all controversies concerning property, and in all suits between two or more persons***the parties have a right to a trial by jury; and this method of procedure shall be held sacred."
> See "We Hold These Truths," supra, p. 53.

The Declaration of the Causes and Necessity of Taking Up Arms, prepared by John Dickinson and Thomas Jefferson, listed as one of the causes:

> "***for depriving us of the accustomed and inestimable privilege of trial by jury in cases affecting both life and property;"
> See "Documents of American History," 8th Edition, by Henry Steele Commager, p. 93.

Article 2 of the Northwest Ordinance, adopted in July, 1787, provided, in part:

> "The inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury.***No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land."
> See "Documents of American History," supra, pp. 130-1.

The right to trial by jury in civil and criminal cases was considered a unitary right, apparently held as basic and important as the great writ of habeas corpus. It can hardly be disputed that the right to trial by jury in civil cases was considered to be a very fundamental right at the time of and following the formation of the Union.

In 1830, speaking for the United States Supreme Court, in *Parsons v. Bedford, et al.*, 28 U.S. (3 Pet.) 433, 443, 7 L. Ed. 732, Mr. Justice Story recognized in explicit terms the fundamental nature of the right to trial by jury in civil cases:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitide, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the *seventh amendment* of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as *a fundamental guarantee of the rights and liberties of the people.*" (Emphasis added.)

There is additional language in Supreme Court opinions concerning the fundamental nature of the right to jury trial and the presumption in favor of the right in civil cases. See *Jacob v. New York*, 315 U.S. 752, 62 S. Ct. 854, 86 L.Ed. 1166 (1942). The Court has broadened the class of cases and issues where jury trial exists as of right, see *Beacon Theatres v. Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 2d 988 (1959); *Dairy Queen v. Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L.Ed. 2d 44 (1962), and has held that the Federal policy favoring jury trials applies in diversity cases even though the State courts would deny a jury trial. *Byrd v. Blue Ridge Rural Electric Corp.*, 356 U.S. 525, 78 S. Ct. 893, 2 L.Ed. 2d 953 (1958); *Simler v. Connor*, 372 U.S. 221, 83 S. Ct. 609, 9 L.Ed. 2d 691 (1963). A recent line of Supreme Court cases indicates a growing tendency on the part of the Court to apply the principles of the Seventh Amendment to State civil cases.

In *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 83 S. Ct. 659, 9 L.Ed. 2d 618 (1963), the petitioner obtained a jury verdict in State court in a suit against his employer under the Federal Employers' Liability Act. The State appellate court reversed, finding "no direct evidence" of negligence. After the State supreme court refused review, the United States Supreme Court granted certiorari to consider whether the State appellate court had improperly invaded the jury's function. The Court held that there was sufficient evidence to go to the jury and that the State court had erred in making a further examination of the jury's findings. See also *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957). Suits under the Federal Employers' Liability Act are not "Suits at common law," so the Seventh Amendment is not applicable even in Federal court, and the F.E.L.A. does not require a jury trial. Nevertheless, the Court has held that a jury trial is guaranteed when suits under that Act are filed in State court, and State appellate courts may not reexamine jury findings. The same rule has been applied by the United States Supreme Court to suits in State court under the Jones Act and the Boiler Inspection Act. See e.g., *Sanko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed. 2d 404 (1957); *Harch v. Ill. Terminal R.R. Co.*, 348 U.S. 940, 75 S.Ct. 362, 99 L.Ed. 736 (1955); *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946). Although these cases involve Federally-created rights sued upon in State Courts, the same "common law tradition" embodied in the Seventh Amendment which has been used to require a jury trial in these statutory causes of action should be applied to all State court trials or at least trials in those States which have accorded to its citizens the right to jury trial in civil cases.

The rights secured by the Seventh Amendment are indeed fundamental to our Anglo-American system. The fact that the Supreme Court has not, as yet, either by selective incorporation, notions of fundamental fairness, or otherwise, included the Seventh Amendment among those which it has held to be operative on the States through the Fourteenth Amendment is no reason, in and of itself, to conclude that the Seventh Amendment is not one of the " 'fundamental principles of liberty and justice which lie at the base of all civil and political institutions,' " *Powell v. Alabama*, 287 U.S. 45, 67, 53 S. Ct. 55, 63, 77 L.Ed. 158 (1932), "basic to our scheme of jurisprudence," *In re Oliver*, 330 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 388 (1937).

This Court, however, if it chooses, need not reach this broadly-phrased constitutional question. The ultimate question presented in this instance is more narrowly defined: Whether, once a State, by its laws, accords its citizens the right to trial by jury, the Courts of that State are thereby bound by the mandate of the Seventh Amendment, prohibiting the trial and appellate courts from re-examining the facts found by the jury otherwise than according to the rules of common law. The decisions of the United States Supreme Court to date cannot answer this question.

In *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 557, 22 L.Ed. 487 (1874), the Supreme Court of the United States noted, in dicta, that the Seventh Amendment did not apply to trials in State courts. In support of this proposition, the Court cited *Barron v. Baltimore*, 32 U.S. (7. Pet.) 243, 247, 8 L.Ed. 672 (1833); *Twitchell v. Commonwealth*, 74 U.S. (7 Wall.) 321, 326, 19 L.Ed. 223 (1868); *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551, 8 L.Ed. 751 (1833); *Fox v. Ohio*, 46

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(5 How.) 410, 434, 12 L.Ed. 231 (1847); and *Smith v. Maryland*, 59 U.S. (18 How.) 76, 15 L.Ed. 263 (1855). Each of these cases, however, was decided prior to the enactment of the Fourteenth Amendment in 1868. Furthermore, over the years, this Court has held most of the guarantees of the Bill of Rights to be requirements of due process and therefore applicable to the States. See *Chicago B. & Q. R. Co.*, 166 U.S. 266 17 S.Ct. 581, 41 L.Ed. 979 (1897); *Friske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967); *In re Oliver*, 330 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, (1948); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967).

One year after the *Edwards*, supra, decision, the Supreme Court ruled, in *Walker v. Sauvinet*, 92 U.S. 90, L.Ed. 678 (1875), that:

> "A trial by jury in suits at common law pending in the State courts is not***a *privilege or immunity* of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge." (Emphasis added.)

In support of the Court's pronouncement, Mr. Justice Waite cited only *Edwards v. Elliott*, supra, and *Murray's Lessee v. Hoboken L.I. Co.*, 54 U.S. (18 How.) 272, 15 L.Ed. 372, decided in 1855. Mr. Justice Field and Mr. Justice Clifford dissented from the opinion and judgment of the Court. The *Walker*, supra, decision is of little precedential value in deciding the instant case for three reasons. First, as noted above, there was no post-Fourteenth Amendment support for the Court's decision. Second, the question presented in *Walker*, supra, was whether a judge could, by statute, be

permitted to direct a verdict when the jury *failed to agree*. In the instant case, the question is whether the Courts in those States according their citizens the right to trial by jury are bound by the Seventh Amendment's prohibition from re-examining facts *found and agreed upon* by a jury other than according to the rules of common law. Third, the Court refrained from considering the Fourteenth Amendment due process question. Though the United States Supreme Court has, for the past hundred years, not deviated from its holding in *Walker v. Sauvinet*, supra, a re-examination of that decision is necessary in light of its questionable foundation and this Court's enlightened opinions in the area of Fourteenth Amendment due process.

The right to a meaningful trial by jury in civil cases is a fundamental right. No one could seriously question the fact that the right to trial by jury in the Federal Courts is protected by the Seventh Amendment, and no one could seriously question the fact that in the federal system, the facts found by the jury may not be re-examined by the courts except according to the rules of common law. The right to trial by jury as provided for in the Seventh Amendment to the United States Constitution is as fundamental a right as those contained in the remainder of the first eight Amendments, and thus, the guarantees of the Seventh Amendment should be held to be operative on the States through the Fourteenth Amendment. The Seventh Amendment prohibits the States from granting a right to trial by jury in civil cases on the one hand, and then, on the other hand, as was done in this case, nullifying the total effect of the jury trial by allowing the trial and appellate judges to set aside the findings of the jury simply because they personally did not agree with those findings.

Petitioners contend that as long as the laws of Ohio accord to its citizens the right to trial by jury in civil cases, the Courts of that State are prohibited by the Seventh Amendment to the United States Constitution from re-examining the facts found by the jury otherwise than according to the rules of common law.

Should this Court reject Petitioners' contention that the rights and proscriptions of the Seventh Amendment are so fundamental as to be applied to the States, the question of whether, once the right to trial by jury has been accorded by a State, the re-examination prohibition of the Seventh Amendment should apply must still be resolved. The history of the Seventh Amendment, the prominent position in which Americans have held, and continue to hold the right to trial by jury in civil cases, and this Court's interpretation of the rights guaranteed under the Bill of Rights and the Fourteenth Amendment, indicate the question should be answered in the affirmative. Without the guarantees of Due Process and the Seventh Amendment's prohibition of judicial re-examination of jury findings otherwise than according to the rules of common law, the State accorded right to jury trial would be but an empty shell.

In the exercise of its power and to satisfy the public need, a State may choose the remedy best adapted in the legislative judgment to protect the interests concerned, provided its choice is not unreasonably arbitrary, and the procedures it adopts satisfy the constitutional requirements of reasonable notice and opportunity to be heard the reasonable methods for determining the resolution of legal disputes. Assuming that the Seventh Amendment is not held to require a State to afford its citizens the right to jury trial in civil cases, a State would be free to determine whether or not to grant the right.

But if a State accords to its citizens the right to trial by jury, as Ohio has done, it cannot dilute that right—in effect nullify its existence—by permitting its courts to re-examine facts found and agreed upon by the jury otherwise than according to the rules of common law. Not only the Seventh Amendment, but our most basic notions of due process, require that a State observe the common law limits on court re-examination of jury findings.

Respectfully submitted,
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APPENDIX A

JUDGMENT ENTRY OF COURT OF COMMON PLEAS

(Filed November 15, 1974)

This matter came on for hearing on the motion of defendant The Sandusky Paint Company to set aside the verdict entered in this cause on June 21, 1974 and the subsequent Judgment entered thereon on July 15, 1974 and to enter judgment for defendant The Sandusky Paint Company and, in the alternative, for a new trial.

On consideration of said motion and the oral arguments relating thereto, the Court finds the said defendant's motion for a new trial is not well taken and should be overruled, and that said defendant's motion to set aside the aforesaid verdict and Judgment and to enter judgment for said defendant is well taken and should be granted for the following reasons:

1. The verdict and Judgment are not supported by substantial probative evidence;
2. The uncontroverted evidence clearly demonstrates that the plaintiff Dorcea Mielke assumed the risk of her injury; and
3. The verdict and Judgment are contrary to law.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the motion of defendant The Sandusky Paint Company for a new trial be and hereby is overruled; that the motion of said defendant to set aside the former verdict and the Judgment thereon and to enter judgment for said defendant be and hereby is granted; that said verdict

and Judgment are hereby vacated; that judgment be and hereby is entered in favor of defendant The Sandusky Paint Company; and that the costs of this action be and hereby are assessed to plaintiffs.

/s/ Bruce Huffman
Judge

APPROVED AS TO FORM:

Buckingham, Ramsey, Didelius & Holzapfel
/s/ Richard D. Holzapfel
Attorneys for Defendants,
The Sandusky Paint Company

Jerry B. Murray

/s/ Foster J. Fludine
Foster J. Fludine
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BLEED THROUGH

APPENDIX B

DECISION AND JOURNAL ENTRY OF COURT OF APPEALS

(July 18, 1975)

Finding appellants' assignment of error not well taken, and finding appellees' assignment of error not well taken, judgment of the Common Pleas Court of Erie County is affirmed at appellants' costs and cause remanded to said court for execution for costs. See Opinion by Potter, J., on file.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22(E).

Clifford P. Brown, P.J., ***Frank W. Wiley*** and ***John W. Potter,*** JJ., concur.

OPINION OF COURT OF APPEALS
(July 18, 1975)

Potter, J. This case involves a slip and fall on a vinyl asbestos tile floor and was an action for personal injuries received by the plaintiff Dorcea Mielke and for expenses, losses of services and consortium by Ernest Mielke, her husband. The defendants are Singara Grotto, Inc., a fraternal organization which owned and occupied the building in which Dorcea Mielke was injured, the Sandusky Paint Company which sold to Singara Grotto, Inc., a floor finish called Triple Life and Purex Corporation, Ltd., the manufacturer of the floor finish.

As to Singara Grotto, Inc., the case was one in tort for negligence, and as to the remaining defendants, the case proceeded as one on implied warranty and as to these two defendants was a products liability case.

The cause proceeded to trial, and at the conclusion of the evidence the defendant Singara Grotto, Inc. moved for a directed verdict pursuant to Civ. R. 50(A). The trial court granted this motion. The jury thereafter rendered a verdict for plaintiffs in the total sum of $210,000.00. The defendant Purex Corporation, Ltd., filed its motion to set aside the verdict and to enter judgment for the defendant Purex Corporation, Ltd., and in the alternative for a new trial. The trial court found the motion for new trial was not well taken, but granted defendant's motion to set aside the verdict and judgment, and entered judgment for the defendant. The trial court set forth in its entry the following reasons for granting this portion of defendant's motion.

"1. The verdict and Judgment are not supported by substantial probative evidence.

"2. The uncontroverted evidence clearly demonstrates that the plaintiff, Dorcea Mielke, assumed the risk of her injury.

"3. The verdict and Judgment are contrary to law."

The defendant, The Sandusky Paint Company, filed a similar motion which was also granted. To the judgment, as rendered, plaintiffs filed their notice of appeal. Purex Corporation, Ltd., and The Sandusky Paint Company filed their notices of appeal from the judgment overruling the defendant-cross-appellants' motions for a new trial. Singara Grotto, Inc. is not a party to this appeal and the judgment as to it is final and now a non-appealable order. The plaintiffs' one assignment of error is as follows:

"The trial court committed reversible error in granting defendants' motion for directed verdict since reasonable minds could come to more than one conclusion. It's three reasons are contrary to law and constitute reversible error. On the facts of this case, the granting of the judgment notwithstanding the verdict is contrary to the right to jury trial, guaranteed by the Ohio and United States Constitutions and constitutes reversible error."

Defendant-appellant's assignment of error is as follows:

"The Trial Court erred by denying defendant-appellants the conditional alternative relief of a new trial pursuant to Civil Rule 50 (B) and (C)."

We find that the assignments of error of the plaintiffs and the defendants are not well taken.

This being a products liability case based on implied warranty, the case of *Lonzrick vs. Republic Steel Corp.*, (1966), 6 Ohio St. 2d. 227, is the lodestar. In that case, the requirements for the plaintiff to recover are as follows:

> "For the plaintiff to recover, he must prove, by the required degree of proof, that the joists were defective, that they were defective at the time the manufacturer sold them, that the defect caused them to collapse while they were being used for their ordinary intended purpose, that the defect was the direct and proximate cause of the plaintiff's injury, and that the plaintiff's presence was in a place which the defendant could reasonably anticipate." p. 237

In order for the plaintiffs to recover on their theory of products liability, the plaintiffs had to first establish that the product Triple Life was defective, and that by reason of this defect the product produced a slippery surface in violation of its implied warranty. In order for a product to satisfy the general requirement of being a non-slippery floor-finish product, the coefficient of friction should be within the area of 0.5 to 0.4 or better. A recognized method of testing the coefficient of friction of a floor-finish product is by the James Machine. The plaintiffs produced as an expert witness, Dr. Irving Sherman. Unfortunately, Dr. Sherman misplaced the shoes worn by Mrs. Mielke on the night of her fall. For the want of a shoe, and certain pretrial procedures, Dr. Sherman's testimony relative to the coefficient of friction, using Mrs. Mielke's shoes, was lost to plaintiffs.

Dr. Sherman did not run any other tests to determine the coefficient of friction of the product Triple Life floor finish as applied to a vinyl asbestos floor except chemical analysis.

Based on his analysis of the chemical composition of the product, the doctor testified as follows:

> "It is extremely highly probable that the material has undesirable slip characteristics, that it probably would be somewhat below the standard insofar as being slippery on a floor."

It is defendants' position that considering the totality of the expert's testimony that the above statement is not sufficient to place the issue of defect before a jury and that the word "somewhat" does not meet the standard of scientific certainty required in the answer of an expert witness. We agree and find from the record, as did the trial judge, that there was insufficient evidence to permit reasonable minds to reach different conclusions as to the existence of a defect. The jury's verdict and subsequent judgment in this regard was not supported by any substantial probative evidence and, therefore, the verdict and judgment was contrary to law. See *McComis vs. Baker* (1974), 40 Ohio App. 2d. 332, for a recent discussion of the Civ. R. 50(B) test.

Reference is also made by the defendants to the fact that the plaintiff, Dorcea Mielke, thought the kitchen floor was slippery, that she had frequently traversed it and that she was drying dishes in the kitchen of the Grotto immediately prior to her fall. Her clothing in the hip area was damp and the ambulance attendant stated that his knees became damp from contact with the floor as he endeavored to place Mrs. Mielke on a stretcher. There was also testimony as to a white substance on the soles of the shoes worn that evening by the plaintiff, and positive evidence to the effect that a white substance cannot be derived from Triple Life. Other evidence was introduced relative to Plaintiff's physical condition as a proximate cause of her injuries. From this testimony, defen-

dants assert that if there was a defect that the defense of assumption of the risk is applicable as found by the trial court, and also that where an act or event may be the result of one or more causes, the burden of proof that one of such causes is the sole and proximate cause is not met when the evidence as to all causes is equal. See *Westinghouse Electric Corp. v. Dolly Madison Leasing* (1975), 42 Ohio St. 2d 122.

Plaintiffs assert with some logic that a finding of assumption of the risk is not consistent with the holding of the trial court that there was no defect. See *Briere vs. Lathrop Co.* (1970), 22 Ohio St. 2d. 166; cf. 4 ALR 3d. 501, Contributory Negligence or Assumption of Risk, Products Liability Implied Warranty, and 46 ALR 3d. 24.

Nevertheless, we find that the Civ. R. 50(B) motion was well taken and the trial judge complied with Par. (E) of said rule. Even without the finding as to assumption of risk, the holding of the trial court was proper. Since this Court did not find the trial court to be in error in its ruling on the motion for judgment notwithstanding the verdict, defendant-appellants' assignment of error, which is asserted in the alternative, is found not well taken.

The judgment of the trial court as to each defendant is affirmed at appellants' costs. Cause remanded for execution for costs.

JUDGMENT AFFIRMED

Brown, P.J., and ***Wiley, J.***, concur.

APPENDIX C

MOTION FOR AN ORDER DIRECTING COURT OF APPEALS FOR ERIE COUNTY TO CERTIFY ITS RECORD

The Supreme Court of Ohio, 1975 Term
(November 23, 1975)

It is ordered by the Court that this motion is overruled.

Costs: Motion Fee, $20.00, paid by Murray & Murray.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 9 day of December, 1975.

Thomas L. Startzman *Clerk*

Sam F. Adkins *Deputy*